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Nos. 00-1526 and 00-9419

In the Supreme Court of the United States

DORA GARCIA CISNEROS, PETITIONER

v.

UNITED STATES OF AMERICA

BETTY LOUISE MAREK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner Marek's use of Western Union to send $500 to the "hit man" she hired satisfies 18 U.S.C. 1958(a)'s requirement that the defendant "use[] or cause[] another * * * to use * * * any facility in interstate * * * commerce." Pet. 00-9419.

2. Whether the court of appeals properly applied the plain error standard to petitioner Marek's claim that the district court failed to determine the factual basis for her plea, in violation of Federal Rule of Criminal Procedure 11(f). Pet. 00-9419.

3. Whether the district court properly instructed the jury on the elements of murder for hire in violation of 18 U.S.C. 1958. Pet. 00-1526.

4. Whether petitioner Cisneros's conviction under 18 U.S.C. 1958 was barred by the statute of limitations. Pet. 00-1526.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	10
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998)	14
Apprendi v. *New Jersey*, 120 S. Ct. 2348 (2000)	29
Aquionics Acceptance Corp. v. *Kollar*, 503 F.2d 1225 (6th Cir. 1974)	18
Barnes v. *United States*, 412 U.S. 837 (1973)	24
Caminetti v. *United States*, 242 U.S. 470 (1917)	15
Chapman v. *United States*, 500 U.S. 453 (1991)	14
Dunn v. *United States*, 442 U.S. 100 (1979)	15
Dupuy v. *Dupuy*, 511 F.2d 641 (5th Cir. 1975)	18
Loveridge v. *Dreagoux*, 678 F.2d 870 (10th Cir. 1982)	18
Mead Corp. v. *Tilley*, 490 U.S. 714 (1989)	14
Muscarello v. *United States*, 524 U.S. 125 (1998)	14
Myzel v. *Fields*, 386 F.2d 718 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968)	18
New York v. *United States*, 505 U.S. 144 (1992)	18
Rewis v. *United States*, 401 U.S. 808 (1971)	26
Spilker v. *Shayne Labs., Inc.*, 520 F.2d 523 (9th Cir. 1975)	18
Toussie v. *United States*, 397 U.S. 112 (1970)	28
United States v. *Auerbach*, 913 F.2d 407 (7th Cir. 1990)	23, 26-27

Cases—Continued: Page

United States v. *Bailey*, 444 U.S. 394 (1980) 28
United States v. *Baker*, 82 F.3d 273 (8th Cir.), cert. denied, 519 U.S. 1020 (1996) 12, 26
United States v. *Barry*, 888 F.2d 1092 (6th Cir. 1989) 12, 18
United States v. *Brockdorff*, 992 F. Supp. 22 (D.D.C. 1997) 27-28
United States v. *Clark*, 646 F.2d 1259 (8th Cir. 1981) 23
United States v. *Davidson*, 122 F.3d 531 (8th Cir.), cert. denied, 522 U.S. 1034 (1997) 27
United States v. *Delpit*, 94 F.3d 1134 (8th Cir. 1996) 27
United States v. *Edelman*, 873 F.2d 791 (5th Cir. 1989) 22
United States v. *Feola*, 420 U.S. 671 (1975) 15, 23, 24
United States v. *Finley*, 175 F.3d 645 (8th Cir. 1999), cert. denied, 528 U.S. 1094 (2000) 27
United States v. *Garrett*, 716 F.2d 257 (5th Cir. 1983), cert. denied, 466 U.S. 937 (1984) 27
United States v. *Gilbert*, 181 F.3d 152 (1st Cir. 1999) 17
United States v. *Gooding*, 473 F.2d 425 (5th Cir.), cert. denied, 412 U.S. 928 (1973) 25
United States v. *Herrera*, 584 F.2d 1137 (2d Cir. 1978) 23, 25
United States v. *Houlihan*, 92 F.3d 1271 (1st Cir. 1996) 22, 25
United States v. *LeFaivre*, 507 F.2d 1288 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975) 23
United States v. *Lopez*, 514 U.S. 549 (1995) 15, 17, 19
United States v. *Paredes*, 950 F. Supp. 584 (S.D.N.Y. 1996) 20
United States v. *Perrin*, 580 F.2d 730 (5th Cir. 1978), aff'd on other grounds, 444 U.S. 37 (1979) 23
United States v. *Presley*, 478 F.2d 163 (5th Cir. 1973) ... 25

Cases—Continued: Page

United States v. *Razo-Leora*, 961 F.2d 1140 (5th Cir. 1992) 23
United States v. *Roselli*, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971) 23
United States v. *Smith*, 232 F.3d 650 (8th Cir. 2000) 29
United States v. *Stevens*, 842 F. Supp. 96 (S.D.N.Y. 1994) 20
United States v. *Superson*, No. 95 CR 564, 1997 WL 223072 (N.D. Ill. Apr. 24, 1997) 27
United States v. *Villano*, 529 F.2d 1046 (10th Cir.), cert. denied, 426 U.S. 953 (1976) 23
United States v. *Vonn*, cert. granted, 121 S. Ct. 1185 (2001) 20
United States v. *Weathers*, 169 F.3d 336 (6th Cir.), cert. denied, 528 U.S. 838 (1999) 18, 19, 26
United States v. *Winters*, 33 F.3d 720 (6th Cir. 1994), cert. denied, 513 U.S. 1172 (1995) 22
United States v. *Yashar*, 166 F.3d 873 (7th Cir. 1999) 28
United States v. *Yermian*, 468 U.S. 63 (1984) 23
United States v. *Zizzo*, 338 F.2d 577 (7th Cir. 1964), cert. denied, 381 U.S. 915 (1965) 26
Western Union Tel. Co. v. *Lenroot*, 323 U.S. 490 (1945) 13-14

Constitution, statutes and rules:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 17, 18
Amend. X 18
Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q) (1994) 17
Securities Exchange Act of 1934 § 10, 15 U.S.C. 78j 17

Statutes and rules—Continued: Page

Travel Act, 18 U.S.C. 1952 ..... 12, 16, 23, 26
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60003(a)(11), 108 Stat. 1969 29
18 U.S.C. 247(b) (1994) 14
18 U.S.C. 751(a) 28
18 U.S.C. 1001 23
18 U.S.C. 1708 24
18 U.S.C. 1958 (1994 & Supp. V 1999) ..... *passim*
18 U.S.C. 1958(a) (1988) 29
18 U.S.C. 1958(a) (1994 & Supp. V 1999) 9, 10, 12, 14, 15, 28
18 U.S.C. 1958(b) 12, 13
18 U.S.C. 1958(b)(2) 12, 13
18 U.S.C. 1959 13
Fed. R. Crim. P.:
Rule 11 ..... 10, 20
Rule 11(f) 11, 19, 20
Miscellaneous:
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 13, 16

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 66-103)[1] is reported at 238 F.3d 310. Earlier opinions of the panel in *Cisneros*, No. 00-1526 (Pet. App. 1-30, 31-63) are reported at 194 F.3d 626 and 203 F.3d 333. The opinion of

[1] "Pet. App." refers to the appendix to the petition in No. 00-1526 (*Cisneros*). Unless otherwise indicated, all references to the appendix will be to that appendix.

the panel in *Marek*, No. 00-9419 (00-9419 Pet. App. 47-52) is reported at 198 F.3d 532.

JURISDICTION

The judgment of the court of appeals sitting en banc was entered on January 4, 2001. A petition for rehearing in No. 00-1526 (*Cisneros*) was denied on February 2, 2001. Pet. App. 104-105. The petition for a writ of certiorari in No. 00-1526 (*Cisneros*) was filed on April 4, 2001, and in No. 00-9419 (*Marek*) on March 29, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner Cisneros was convicted on a federal murder-for-hire charge, in violation of 18 U.S.C. 1958. She was sentenced to life imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed. Pet. App. 31-63.

Following the entry of a guilty plea in the United States District Court for the Southern District of Texas, petitioner Marek was convicted of murder for hire, in violation of 18 U.S.C. 1958. She was sentenced to 87 months' imprisonment, to be followed by a three-year term of supervised release. The court of appeals affirmed. 00-9419 Pet. App. 47-52.

On February 24, 2000, the court of appeals, on its own motion, determined to rehear petitioner Cisneros's case en banc, and ordered that it be consolidated with petitioner Marek's case for purposes of briefing and argument. Pet. App. 64-65. On January 4, 2001, the en banc court affirmed the convictions of both Cisneros and Marek. *Id.* at 66-103.

1. *Petitioner Cisneros.*

a. In the spring of 1992, petitioner Cisneros's daughter began dating high school classmate Joey Fischer in Brownsville, Texas. When Fischer ended the courtship several

weeks later, Cisneros unsuccessfully tried to get Fischer to change his mind. Cisneros then went to fortune teller Maria Martinez, who advised that the relationship would not lead to marriage. Cisneros asked Martinez to put a curse on Fischer, and later asked her to find someone to beat Fischer up. Accordingly, in October 1992, Martinez asked a client, Daniel Garza, to find someone to rough up Fischer. Garza had come to Martinez seeking advice on his failed relationship with his wife. Pet. App. 32.

In early 1993, Cisneros told Martinez that she wanted Fischer murdered. Martinez relayed that request to Garza, who assured her that he would find someone for the job. During the ensuing weeks, Garza frequently called Martinez to discuss his love life. Martinez, however, was under daily pressure from Cisneros for news on the murder scheme; accordingly, she would interrupt Garza during their conversations to ascertain whether he had found someone to kill Fischer. Garza lied several times by stating that he had found someone to commit the crime; he and Martinez would then discuss the murder before returning to the subject of Garza'a relationship with his wife. Garza placed at least four of those telephone calls to Martinez from telephone booths in Mexico. Pet. App. 32-33.[2]

In early February 1993, Garza found two men, Israel Olivarez and Heriberto "Eddie" Pizana, to kill Fischer.

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[2] At trial, Garza testified that he made at least four calls from telephone booths in the Mexican towns of San Fernando and Matamoros, paying for the calls after making them. On cross-examination, when confronted with an interview report of FBI Agent David Church stating that Garza had made the calls collect, Garza testified that the agent was mistaken, and explained that collect calls from Mexico were difficult to make. To support Cisneros's claim that no calls were made from Mexico, the defense called Agent Church, who testified that Garza had told him that the calls from Mexico were collect, but that Martinez's phone records did not reflect any such calls. Pet. App. 33.

Olivarez and Pizana were both hit men and car thieves working for a drug smuggling and car theft ring operated by Rudy Cuellar. Olivarez told Garza that they would commit the crime the next time they were in Brownsville. Garza gave the two men a photo of Fischer and a map to his house. Pet. App. 34. On the afternoon of March 2, 1993, Garza stopped at the La Quinta Inn in Brownsville, where he met Olivarez. Olivarez told him that "he was ready to do the job." That evening, at 6:39 p.m., a car with Mexican license plate number "821 THE7" crossed into the United States from Mexico at the Brownsville point of entry. A vehicle with that plate had crossed the border 18 times between August 1992 and March 1993. At 8:26 p.m., Pizana and another Cuellar hit man, Ramon Palomares, checked into the La Quinta Inn. The receptionist registered their car as a white Grand Marquis with Mexican plates; her handwriting made it difficult to decipher whether the plate number was "821 TWEX" or "821 THE7." *Ibid.*

Around 7:00 a.m. on March 3, 1993, Fischer was shot and killed in his driveway. Handwriting on the back of a bail bondsman's business card found at the scene matched Cuellar's handwriting. A four-door white car with Mexican plates, driven by a young Hispanic man with a short beard, was seen in the vicinity of Fischer's house near the time of the murder. Within an hour of the murder, Olivarez told Garza that Fischer was dead; Garza told Martinez; and Martinez paid Garza for the murder. Garza gave the money to Olivarez. Pet. App. 35-36.

Garza agreed to cooperate with the authorities. Wearing a wire, he twice called Martinez and told her that the gunmen wanted more money; each time, Martinez gave it to him. Police arrested Martinez, who agreed to arrange a meeting with Cisneros. The police arrested Cisneros in her car as she was giving Martinez $500. Pet. App. 36.

b. Cisneros was charged with and convicted of violating the federal murder-for-hire statute, 18 U.S.C. 1958. Section 1958 provides in relevant part:

> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed * * * as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; * * *
>
> (b) As used in this section and section 1959—
>
> * * * * *
>
> (2) "facility of interstate commerce" includes means of transportation and communication.

18 U.S.C. 1958 (1994 & Supp. V 1999) (footnotes omitted).

At trial, the district court instructed the jury:

> It is a crime for anyone to cause another to travel in foreign commerce or cause another to use a facility in foreign commerce, with the intent that a murder be committed * * * as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value. Pecuniary value is money.
>
> For you to find [Cisneros] guilty, you must be satisfied * * * that all of the following matters have been proven to your satisfaction by proof beyond a reasonable doubt. * * *
>
> Number one, that she caused another to travel in foreign commerce or caused another to use a facility in foreign commerce.

> Now, "facility in foreign commerce" includes means of transportation and communication. Now, as part of the burden of proof, the Government does not have to prove that [Cisneros] intended that foreign travel occur, or that foreign commerce facilities be used in connection with the murder, or even that [Cisneros] knew that foreign travel occurred or would occur, or that foreign commerce facilities were or would be used. But the Government must prove that somebody, you know, involved in the venture, itself, traveled in foreign commerce or caused another to use a facility in foreign commerce.
>
> In addition to that, that she did that with the intent that the murder of Albert Joseph "Joey" Fischer be committed in violation of the laws of the State of Texas.

Tr. 1515-1517. The jury found Cisneros guilty.

c. The court of appeals affirmed. Pet. App. 31-63.[3] The court first addressed the jurisdictional element of 18 U.S.C. 1958, which in relevant part requires that the defendant "use" or cause another to "use" a "facility in interstate or foreign commerce." To satisfy that jurisdictional element, the court held, it is not sufficient that the defendant use or cause another to use an *interstate facility*. Instead, the court held, the *use* of the facility must be interstate in nature, *i.e.*, it must cross state lines. Pet. App. 38-45. In the case before it, the court concluded that there was an interstate or foreign use of a facility of commerce. In particular, the court concluded that the jury could have found that Martinez had participated in international telephone calls as Cisneros's

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[3] The court had affirmed Cisneros's conviction in an earlier opinion (Pet. App. 1-30), dated October 28, 1999, but vacated that opinion when it granted Cisneros's petition for panel rehearing.

agent, and that those calls facilitated the murder-for-hire scheme. *Id.* at 47-50.

The court also found that there was "a sufficient nexus between the use of the facility in foreign commerce and the murder scheme because the telephone calls unquestionably facilitated in arranging the murder." Pet. App. 49. The court reasoned that, "[w]ithout Martinez's incessant reminders during those calls, it is reasonable for a jury to have believed that Garza would not have made as serious an effort to find a hit man." *Ibid.* The court rejected Cisneros's claim that the district court erred in refusing to instruct the jury that the use of the facility in foreign commerce had to have been initiated "in furtherance" of the murder for hire. *Id.* at 53. "Garza's calls need not have been made for the purpose of furthering the murder-for-hire," the court stated. *Ibid.* "It is enough that those calls facilitated the scheme." *Ibid.* The court further explained:

> Here, it may well be true that Garza did not place the calls "in furtherance" of the murder for hire scheme. He called Martinez for marital advice. Martinez was the one who would bring up the subject of the Fischer murder. But those international calls gave Martinez the opportunity to pursue her earlier requests that Garza arrange the murder. In that sense, they facilitated the murder, even though the use of the telephone across national boundaries was purely incidental.

Id. at 53-54. The court also rejected Cisneros's claim that the district court should have required proof that she knew, intended, or could have foreseen that she would cause another to travel in foreign commerce or use facilities in foreign commerce. *Id.* at 46, 56.

Finally, the court rejected Cisneros's claim that the district court should have instructed the jury on the statute of limitations. The statute of limitations begins to run, the

court stated, once the crime is complete. Pet. App. 57. In this case, one of the elements of the murder-for-hire offense is receipt of pecuniary value or a promise or agreement to pay, and the indictment charged Cisneros with "caus[ing] another to . . . use a facility in foreign commerce . . . with the intent that the murder of [Fischer] be committed . . . as consideration for a promise and agreement to pay, *and the receipt of, $3,000.*" *Ibid.* The crime as charged and tried by the government in this case, the court reasoned, was complete upon the receipt of the $3000 payment on March 3, 1993. Consequently, the court held, the indictment on February 23, 1998, fell within the five-year limitation period. *Ibid.*

2. *Petitioner Marek.*

Petitioner Marek arranged to have her boyfriend's paramour murdered in exchange for a $500 payment. Unbeknownst to Marek, however, the purported hit man was an undercover FBI agent. On November 19, 1997, Marek delivered $500 to Western Union in Houston, Texas, and the wire transfer was received by the undercover agent in Harlingen, Texas. Marek was indicted on a charge of murder for hire, in violation of 18 U.S.C. 1958. She pleaded guilty to the charge, and was sentenced to 87 months' imprisonment.

Marek appealed her guilty plea, and the court of appeals affirmed. The court found that the intrastate electronic transfer of funds by petitioner via Western Union, an interstate commerce facility, satisfied the jurisdictional requirement of the federal murder-for-hire statute. 00-9419 Pet. App. 48-52. Judge Jolly, who had authored the *Cisneros* opinion, dissented, based on his view that the murder-for-hire statute "should be limited to uses of facilities being used 'in' interstate or foreign commerce as part of the commission of the crime." *Id.* at 52.

3. *En banc proceedings.*

The court of appeals sua sponte reheard both cases en banc. To resolve Marek's case, the court stated, it was necessary to decide "whether, for purposes of satisfying the jurisdictional element of the federal murder-for-hire statute," 18 U.S.C. 1958(a), "it is sufficient that the defendant used an interstate commerce facility in an *intra* state fashion" or whether, instead, the "defendant's use of that facility" must itself be interstate. Pet. App. 74. Resolution of that question, the court further concluded, depended on a basic question of grammar: whether "the phrase 'in interstate or foreign commerce'" in the statute "modifies 'use,'" such that the *use* must be interstate or foreign in nature, or whether the phrase instead "modifies 'facility,'" such that the *facility* must be in interstate or foreign commerce. *Id.* at 76. The court of appeals determined that the latter construction was correct, and that Section 1958 does not require the individual defendant's use of the facility to be interstate in nature. "Purely from a structural viewpoint, we must conclude that 'in interstate or foreign commerce' is an adjective phrase that modifies 'facility,' the noun that immediately precedes it—*not* an adverbial phrase that modifies the syntactically more remote verb, '[to] use.'" *Ibid.* The court found further support for that construction in other provisions of the statute, *id.* at 85-86, in its legislative history, *id.* at 86-87, and in Section 1958's title, which is "Use of interstate commerce facilities in the commission of murder-for-hire," *id.* at 87. Accordingly, the court held that "§ 1958's *use* of a 'facility in interstate commerce' is synonymous with the use of an 'interstate commerce facility' and satisfies the jurisdictional element of that federal murder-for-hire statute, irrespective of whether the particular transaction in question is itself *inter* state or wholly *intra* state." *Id.* at 68.

The court therefore rejected petitioner Marek's claim, made for the first time on appeal, that the district court had violated Rule 11 of the Federal Rules of Criminal Procedure by failing to determine whether Marek's use of Western Union was interstate in nature. Because Marek admitted using Western Union, and Western Union is an interstate commerce facility, the court concluded that Section 1958's jurisdictional element had been met. The court of appeals thus found that the district court did not commit error, much less plain error, in accepting Marek's guilty plea. Pet. App. 71-74, 93. As to petitioner Cisneros, the court held that, even if Section 1958 were given the narrowest interpretation possible, affirmance of her conviction was proper based on the international telephone calls used to facilitate the murder-for-hire scheme. *Id.* at 71, 93.

Judges Jolly, Jones, Smith, Barksdale, and DeMoss dissented. Pet. App. 93-103. In their view, Section "1958 requires that the use of the facility be in interstate or foreign commerce." *Id.* at 93.

ARGUMENT

A. Petitioner Marek contends (00-9419 Pet. 9-25) that her use of Western Union to make an intrastate payment did not constitute the use of "any facility in interstate * * * commerce" within the meaning of the murder-for-hire statute, 18 U.S.C. 1958(a). The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Marek asks this Court to grant the petition to address the meaning of the clause "uses * * * any facility in interstate or foreign commerce" in 18 U.S.C. 1958(a). In particular, she argues (00-9419 Pet. 13-14) that the phrase "in interstate * * * commerce" in Section 1958(a) modifies the word "uses"; consequently, she maintains, the jurisdic-

tional requirement of 18 U.S.C. 1958(a) is not met unless the government shows that the *use* of the facility was interstate commerce, *i.e.*, that the use itself was interstate. Petitioner Marek thus disagrees with the en banc court's conclusion that the phrase "in interstate * * * commerce" modifies the word it immediately follows, "facility," and that the government as a result need only prove that the facility itself (but not necessarily the defendant's use of it) was in interstate commerce.

a. As an initial matter, at the time she pleaded guilty to the offense, Marek did not contend that the statute required that her *use* of Western Union be interstate in nature; instead, she raised that issue for the first time on appeal by challenging the adequacy of the factual basis for the plea. See Pet. App. 72. But Marek nowhere argues that, if the district court had inquired into whether her use of Western Union was interstate in nature before accepting her plea, the result in this case would have been different. The indictment identified Western Union as the facility of interstate commerce; Marek admitted using Western Union to transfer money to further the murder for hire; and it never has been disputed that the use of Western Union was in fact interstate in nature. As the court of appeals observed, "the Western Union procedure for wiring money from one Texas city to another * * * required Western Union agents in both cities to call the company's main computer in Bridgeton, Missouri." *Id.* at 69 n.8. As a result, even under the construction of the statute Marek now posits, the further inquiry under Rule 11(f) Marek claims was required would merely have shown that her guilty plea was supported by an adequate factual basis.[4]

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[4] Marek raises no issue of voluntariness. Nor does she anywhere suggest that further inquiry under Rule 11(f) would have caused her to refuse the plea.

b. In any event, Marek's construction of the statute is erroneous. Marek principally relies (00-9419 Pet. 12-14) on a distinction between statutes that use the phrase "facility in interstate * * * commerce" on the one hand, and those that use the phrase "facility of interstate commerce" on the other. In particular, Marek contends that, if the statute requires the use of a "facility *in* interstate" commerce, the government must show that the charged *use* itself was interstate in nature and constituted interstate commerce. In contrast, where the statute requires use of a "facility *of* interstate" commerce, Marek argues, the government need only show that the facility ordinarily may be used for interstate commerce, and need not demonstrate that the actual use charged was interstate in nature. See, *e.g.*, Pet. App. 99 n.5 (dissenting opinion).

In some contexts, that distinction may be relevant. Compare *United States* v. *Barry*, 888 F.2d 1092, 1095 (6th Cir. 1989) (concluding, in the context of the Travel Act, 18 U.S.C. 1952, that "a statute that speaks in terms of an instrumentality *in* interstate commerce rather than an instrumentality *of* interstate commerce is intended to apply to interstate activities only"), with *United States* v. *Baker*, 82 F.3d 273 (8th Cir.) (requirements of the Travel Act satisfied where defendant caused extortion victim to withdraw money from an ATM that was part of an interstate network), cert. denied, 519 U.S. 1020 (1996). But it has no application in the context of the murder-for-hire statute, 18 U.S.C. 1958, because the murder-for-hire statute uses the phrases "facility in interstate * * * commerce" and "facility of interstate commerce" interchangeably. See 18 U.S.C. 1958(a) (1994 & Supp. V 1999); 18 U.S.C. 1958(b)(2). The substantive prohibition provided by Section 1958 uses the phrase "facility in interstate * * * commerce." 18 U.S.C. 1958(a) (1994 & Supp. V 1999). But Section 1958(b), which provides relevant definitions, uses the phrase "facility of

interstate commerce," and defines that phrase as including any "means of transportation and communication." The definition in Section 1958(b) must be intended to apply to Section 1958(a). Neither the phrase "facility of interstate commerce" nor the phrase "facility in interstate commerce" appears in any other provision to which the definition provided by Section 1958(b) applies.[5] Accordingly, it is plain that Congress perceived no difference between the terms "facility in interstate commerce" and "facility of interstate commerce." The legislative history confirms that conclusion. As the court of appeals observed:

> In a discussion of the murder-for-hire portion of the bill extending over three pages, the Senate report uses the phrase "facility [or facilities] *of* interstate commerce" four times and "facility *in* interstate commerce" only once, drawing no apparent distinction between the two. We find inescapable the conclusion that "of" and "in" were considered and used by Congress as synonyms in regards to this particular statute.

Pet. App. 87.[6] Because Western Union's network clearly is an interstate "means of * * * communication," *Western*

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[5] The definitions in Section 1958(b) also apply to 18 U.S.C. 1959 (violent crimes in aid of racketeering activity). But Section 1959 does not refer to facilities either in or of interstate commerce. Thus, Section 1958(b)(2), defining "facility of interstate commerce," must be intended to shed light on Section 1958(a).

[6] See S. Rep. No. 225, 98th Cong., 1st Sess. 304 (1983) (murder-for-hire statute "punishes * * * the use of the facilities of interstate or foreign commerce or of the mails"); *id.* at 305 (option of federal prosecution "should be available when a murder is committed or planned as consideration for something of pecuniary value and the proper [f]ederal nexus, such as interstate travel, use of the facilities of interstate commerce, or use of the mails, is present"); *id.* at 306 ("[t]he gist of the offense is the travel in interstate commerce or the use of the facilities of interstate commerce or of the mails with the requisite intent").

Union Tel. Co. v. *Lenroot*, 323 U.S. 490, 502 (1945), evidence that such a facility was used in a murder-for-hire scheme establishes the jurisdictional element of Section 1958.

Marek's construction of Section 1958, moreover, is at odds with basic principles of grammar and statutory construction. As the court of appeals observed, the words "in interstate or foreign commerce" immediately follow the word "facility"; it is thus most natural to read them as modifying the word "facility" rather than the more distant verb "[to] use." Pet. App. 76. Where Congress has sought to require that the "use" itself be interstate in nature, it has found clear means of expressing that concept. See *id.* at 77 n.22 (citing former 18 U.S.C. 247(b)). That Section 1958(a) is designed to reach any use of interstate facilities in furtherance of a murder for hire (and not merely interstate uses of such facilities) is confirmed by its title, "Use of interstate commerce facilities in the commission of murder-for-hire." "The title is unambiguous and clearly employs 'interstate commerce' to modify 'facility,' not 'use.'" *Id.* at 87. Marek offers no reason why Section 1958 should be interpreted to create a conflict in meaning between its text and its title. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (internal quotation marks omitted); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989) (similar).[7]

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[7] For that reason, Marek's reliance on the rule of lenity (00-9419 Pet. 23-25) is misplaced. The rule of lenity applies only where "grievous ambiguity or uncertainty in the language and structure of the Act" remains *after* the Court has "seize[d] everything from which aid can be derived." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (internal quotation marks omitted). It does not apply simply because a statutory phrase requires interpretation. *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998) ("The simple existence of some statutory ambiguity * * * is not sufficient to warrant application of that rule, for most statutes are

Contrary to Marek's contention (00-9419 Pet. 16-19), that conclusion is consistent with Congress's intent. The national government has a strong interest in ensuring that facilities of interstate commerce are not threatened or employed for improper purposes, even when the particular use or threat is intrastate in nature. As this Court has explained, "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained," *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917), as has Congress's authority "to regulate and protect the instrumentalities of interstate commerce," even where "the threat" or abuse "may come only from intrastate activities," *United States* v. *Lopez*, 514 U.S. 549, 558 (1995).

Here, the legislative history upon which Marek relies demonstrates that Congress broadly intended to protect interstate facilities of commerce from abuse, even if the threat might be from purely intrastate activity. As the Senate Report explains:

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ambiguous to some degree."). Moreover, the rule of lenity "is rooted in fundamental principles of due process, which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn* v. *United States*, 442 U.S. 100, 112 (1979). Application of the rule would not serve that purpose here, since the interstate nexus is the jurisdictional element of the murder-for-hire statute, and the government need not prove that the defendant intended that foreign commerce facilities be used, or even that he knew that such facilities would be used. See pp. 24-26, *infra*. Accordingly, petitioner was not "forced to speculate" as to the illegal nature of her conduct. See *United States* v. *Feola*, 420 U.S. 671, 676-677 n.9 (1975) ("The significance of labeling a statutory requirement as 'jurisdictional' is not that the requirement is viewed as outside the scope of the evil Congress intended to forestall, but merely that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute."). As the decision below aptly observed (Pet. App. 90), "[i]t would be absurd to say that Marek did not know that her conduct—hiring an assassin to commit murder—was prohibited."

> With respect to the [murder-for-hire] offense, the Committee is aware of the concerns of local prosecutors with respect to the creation of concurrent Federal jurisdiction in an area, namely murder cases, which has heretofore been the almost exclusive responsibility of State and local authorities. However, the Committee believes that *the option of Federal investigation and prosecution should be available when* a murder is committed or planned as consideration for something of pecuniary value and *the proper Federal nexus, such as* * * * *use of the facilities of interstate commerce, or use of the mails, is present.*

See S. Rep. No. 225, 98th Cong., 1st Sess. 304 (1983) (emphasis added; footnote omitted). While the Report voiced the expectation that federal prosecutors would exercise discretion and coordinate with state officials to ensure appropriate use of the statute, *id.* at 305, that passage cannot be read (see 00-9419 Pet. 17-19) to limit Section 1958 to murders that involve interstate travel or communications that cross state lines. Instead, the Senate Report evidences Congress's understanding that Section 1958 creates broad federal jurisdiction over murder-for-hire schemes that involve use of the mails or other facilities of interstate commerce.[8]

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[8] In support of her argument that the murder-for-hire statute requires interstate use, Marek also points (00-9419 Pet. 18) to the Senate Report's observation (S. Rep. No. 225, *supra*, at 306) that "an interstate telephone call is sufficient to trigger Federal jurisdiction, as it is under the [Travel Act, 18 U.S.C. 1952]." That observation, however, does not establish that an interstate call is *necessary* to create such jurisdiction under the murder-for-hire statute. Rather, immediately following the observation on which Marek relies, the Senate Report declares that "[t]he gist of the offense is the travel in interstate commerce or *the use of the facilities of interstate commerce or of the mails* with the requisite intent." S. Rep. No. 225, *supra*, at 306 (emphasis added).

c. For the same reasons, interpreting Section 1958 to cover intrastate use of an interstate facility does not (00-9419 Pet. 21-23) run afoul of this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q) (1994), which made it a federal crime "for any individual knowingly to possess a firearm" in a school zone, exceeded Congress's powers under the Commerce Clause. 514 U.S. at 551. In that case, however, there was no claim that the relevant prohibition was "a regulation of the use of the channels of interstate commerce" or an effort "to protect an instrumentality of interstate commerce." *Id.* at 559. The prohibition of Section 1958, in contrast, is such a regulation; it proscribes the misuse of interstate commerce facilities in connection with murder-for-hire schemes.[9] In *Lopez* itself, this Court emphasized that "Congress is empowered to regulate and protect the instrumentalities of interstate commerce * * * even though the threat may come only from intrastate activities." *Id.* at 558. Because Section 1958 represents an effort to prevent the misuse of channels and instrumentalities of interstate commerce, *Lopez* casts no doubt on Section 1958's validity, even when it is applied to activities that are themselves intrastate in nature. See *United States* v. *Gilbert*, 181 F.3d 152, 157-159 (1st Cir. 1999)

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[9] Moreover, in *Lopez* the Court emphasized that the statute there did not have "anything to do with 'commerce' or any sort of economic enterprise"; instead, it barred possession of a gun near a school, without any nexus to economic activity. 514 U.S. at 561. Section 1958, in contrast, is addressed exclusively to a particular sort of economic enterprise: it bars murders for hire, *i.e.*, murders performed in exchange for payment or a promise to pay something of *pecuniary value*. Congress has the power to regulate illegal, as well as legal, commerce.

(rejecting *Lopez* challenge to bomb threat conviction based on intrastate phone calls).[10]

Marek's Tenth Amendment argument (00-9419 Pet. 21-23) is unsupported for the same reason. In *New York* v. *United States*, 505 U.S. 144, 156 (1992), this Court explained that, in cases "involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." Because the murder-for-hire statute is within Congress's power under the Commerce Clause—it regulates the use of interstate commerce facilities—it invades no prerogative reserved to the States.

d. Finally, Marek argues (00-9419 Pet. 9-10) that the decision below conflicts with the Sixth Circuit's decision in *United States* v. *Weathers*, 169 F.3d 336, cert. denied, 528 U.S. 838 (1999). As Marek notes, the *Weathers* opinion stated that the federal murder-for-hire statute "is intended to apply to interstate activities only." *Id.* at 341 (quoting *United States* v. *Barry*, 888 F.2d at 1095). The discussion in *Weathers* upon which petitioner relies, however, was not necessary to the judgment. In that case, the court *affirmed* the defendant's conviction, finding that, when the defendant

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[10] Many existing federal statutes permit federal jurisdiction based on intrastate activities that use interstate commerce facilities. Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. 78j, for example, may be invoked based on purely local telephone calls. See *Loveridge* v. *Dreagoux*, 678 F.2d 870, 873-874 (10th Cir. 1982); *Spilker* v. *Shayne Labs., Inc.*, 520 F.2d 523, 524-525 (9th Cir. 1975); *Dupuy* v. *Dupuy*, 511 F.2d 641, 642-644 & n.3 (5th Cir. 1975); *Aquionics Acceptance Corp.* v. *Kollar*, 503 F.2d 1225, 1228 (6th Cir. 1974); *Myzel* v. *Fields*, 386 F.2d 718, 728 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968).

used a cellular phone to call another person *within* the same State, an electronic signal was sent to communications equipment in *another* State; that interstate signal, the court concluded, was sufficient to establish Section 1958's jurisdictional element. *Id.* at 342 (telephone company was "required to engage in interstate activities by sending a search signal to communications equipment in another state to locate [the defendant's] cellular telephone"). Marek cites no decision of any court of appeals reversing a murder for hire conviction where, as here, the defendant used an interstate communications network to facilitate the murder for hire.

In any event, the question does not appear likely to recur. Although the federal murder-for-hire statute is decades old, the issue Marek raises—whether the statute requires interstate use or merely use of an interstate facility—has been addressed in only two published court of appeals decisions, *Weathers* and the decision below. Furthermore, in both of those cases, the issue was largely academic, because the *uses* of the interstate networks at issue *were* both interstate in nature. As noted above, in *Weathers*, the court of appeals addressed the issue in *dictum*; the use at issue there was interstate, since interstate signaling was involved. Similarly, in this case the issue arose only because Marek failed to press her demand for an inquiry into additional facts when the district court conducted its Rule 11(f) inquiry. In point of fact, no one has ever disputed that, because the Western Union transfer Marek initiated required phone calls between two Texas cities and Western Union's computer in Bridgeton, Missouri, an actual interstate use of the Western Union facility occurred. See p. 11, *supra*. In any event, because the issue thus far has been addressed by only two

circuits (one of them in *dictum*), review by this Court at the present time would be premature.[11]

2. Petitioner Marek also urges (00-9419 Pet. 26-29) this Court to grant her petition because the courts of appeals are divided on the standard of review applicable on appeal when a district court fails to determine that there is a factual basis for a defendant's guilty plea, as required by Federal Rule of Criminal Procedure 11(f), but the defendant makes no objection to that deviation from Rule 11 in the trial court. The proper standard of review of a related Rule 11 issue is currently pending before the Court. *United States* v. *Vonn*, cert. granted, 121 S. Ct. 1185 (2001) (No. 00-973). As explained above, however, Marek's conviction was properly affirmed because the factual basis was adequate. While Marek's claim might fail on plain-error review even if her statutory argument were correct, application of a harmless error standard would not assist her. Accordingly, there is no need to hold this case pending the Court's decision in *Vonn*.

B. Petitioner Cisneros does not dispute that one of the participants in her murder-for-hire scheme used a facility of foreign commerce. Nor does she deny that the use itself was in foreign commerce. Instead, she raises a variety of largely case-specific challenges (00-1526 Pet. 13-25) to the jury instructions on, and the government's proof of, the jurisdic-

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[11] Marek also relies (00-9419 Pet. 9-11) on a pair of district court decisions, *United States* v. *Stevens*, 842 F. Supp. 96, 98 (S.D.N.Y. 1994), and *United States* v. *Paredes*, 950 F. Supp. 584, 590 (S.D.N.Y. 1996). In *Stevens*, however, there was an interstate use: the court found that pager messages used in the murder-for-hire scheme were routed across state lines. 842 F. Supp. at 97-98. There were interstate pager-search signals in *Paredes* as well. 950 F. Supp. at 586-587 & n.4. The district court in *Paredes*, however, concluded that such interstate signaling is insufficient to satisfy the jurisdictional element. *Id.* at 589-590. No court of appeals has accepted that conclusion (and the *Weathers* decision on which Marek relies rejects it).

tional element. The court of appeals correctly rejected those claims, and no further review is warranted.[12]

1. Cisneros first contends (00-1526 Pet. 17) that the district court's jury instructions permitted the jury to find her guilty without making any finding that she used interstate or foreign commerce facilities or caused another to do so. That fact-bound claim of instructional error is without merit. The district court specifically told the jury that, "to find [Cisneros] guilty, you must be satisfied * * * by proof beyond a reasonable doubt" that "[Cisneros] *caused* another to travel in foreign commerce or *caused* another to use a facility in foreign commerce." Tr. 1516 (emphasis added). Cisneros bases her contrary contention on the district court's later statement that "[t]he Government must prove that somebody, you know, involved in the venture, itself, traveled in foreign commerce or caused another to use a facility in foreign commerce"; that statement, she argues, omits the requirement that *she* cause another to use an interstate facility. 00-1526 Pet. 10 n.6, 17. Because Cisneros did not object to the instruction on that ground at the time it was given, her claim is reviewable only for plain error. Once the instruction is read in context, it is apparent that the instruction was not error at all, much less plain error. After

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[12] Cisneros also argues (00-1526 Pet. 13-17) that the court of appeals' en banc opinion erroneously failed to reinstate portions of the panel opinion, all of which had rejected Cisneros's claims on appeal. The asserted error is entirely case-specific and does not meaningfully aggrieve Cisneros in any event. Insofar as there are differences in the facts recited by the vacated panel opinions and the en banc opinion (00-1526 Pet. 16), the differences are not material; each opinion concludes that her conviction should be affirmed. To the extent that Cisneros is concerned that she lacks a final court of appeals judgment from which to seek this Court's review, that concern is misplaced. Even if the en banc opinion does not address all of Cisneros's myriad claims in as much detail as the earlier (now vacated) panel opinions, the en banc court entered a final judgment of affirmance that is reviewable by this Court.

explaining that the government does not have to prove that Cisneros *knew* or *intended* that a foreign commerce facility be used in the murder-for-hire scheme, the court merely emphasized that the jury still had to find that a facility of foreign commerce in fact was used; the government, the court reminded the jury, "must prove that somebody * * * caused another to use a facility in foreign commerce." Tr. 1516. Indeed, immediately after that, the court clarified, "[i]n addition to that, that she did that with the intent that the murder of Albert Joseph 'Joey' Fischer be committed." Tr. 1516-1517.

2. Cisneros's challenge to the district court's decision not to give her proposed causation instruction (00-1526 Pet. 19-20) similarly does not warrant review. Cisneros claims that the district court should have told the jury that she could have "caused" another to use facilities in foreign commerce only if she *knew* or could have *foreseen* that use of foreign commerce facilities would occur. As the court of appeals observed (Pet. App. 56), that instruction "confuses intent with causation." Moreover, as the court correctly found, *ibid.*, the causation element in the murder-for-hire statute does not require that the specific use of the interstate or foreign commerce facility be foreseen or even known. See *United States* v. *Houlihan*, 92 F.3d 1271, 1292 (1st Cir. 1996) ("[T]here is no requirement that each accused * * * intend [a facility in interstate commerce] to be used, or even that each accused know that such a facility probably will be used."); *United States* v. *Winters*, 33 F.3d 720, 721 (6th Cir. 1994) ("[T]here is no intent requirement with respect to the use of the mails [under 18 U.S.C. 1958], and * * * this element of the crime is jurisdictional in nature."), cert. denied, 513 U.S. 1172 (1995); *United States* v. *Edelman*, 873 F.2d 791, 795 (5th Cir. 1989) ("government need not establish that [defendant] intended that the mail be used or that he even knew the mail was used"; government need

only prove specific intent to commit the underlying offense); *United States* v. *Razo-Leora*, 961 F.2d 1140, 1148 (5th Cir. 1992) (same).[13]

That interpretation of the murder-for-hire statute is consistent with this Court's decisions on knowledge of jurisdictional elements. For instance, in *United States* v. *Yermian*, 468 U.S. 63, 68 (1984), the Court held that 18 U.S.C. 1001 does not require the government to prove that a defendant has made false statements "with actual knowledge of federal agency jurisdiction." The Court explained (468 U.S. at 68-70):

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[13] The courts have reached the same conclusion with respect to the similarly worded Travel Act, 18 U.S.C. 1952. *United States* v. *Auerbach*, 913 F.2d 407, 410 (7th Cir. 1990); *United States* v. *Clark*, 646 F.2d 1259, 1268 n.16 (8th Cir. 1981); *United States* v. *Herrera*, 584 F.2d 1137, 1150 (2d Cir. 1978); *United States* v. *Perrin*, 580 F.2d 730, 737 (5th Cir. 1978), aff'd on other grounds, 444 U.S. 37 (1979); *United States* v. *Villano*, 529 F.2d 1046, 1054 (10th Cir.), cert. denied, 426 U.S. 953 (1976); *United States* v. *LeFaivre*, 507 F.2d 1288, 1297-1299 & n.14 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); *United States* v. *Roselli*, 432 F.2d 879, 891 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). Since knowledge of one's own interstate travel is not an element of a violation of the Act by a principal, those courts have held that a defendant may be convicted of aiding and abetting a violation of the Act—or conspiracy to violate its terms—without a showing that the defendant knew or intended that another individual would engage in interstate travel. See, *e.g.*, *United States* v. *LeFaivre*, 507 F.2d at 1298 (aiding and abetting); *United States* v. *Herrera*, 584 F.2d at 1150 (conspiracy); *United States* v. *Roselli*, 432 F.2d at 891-892 (conspiracy). See *United States* v. *Feola*, 420 U.S. 671, 696 (1975) ("[W]here knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense."). The cases cited by Cisneros (00-1526 Pet. 20) are not to the contrary. Those are cases where the defendant knew of the interstate nexus; but none of those cases reversed a conviction on the ground that knowledge of the nexus is required.

> The statutory language requiring that knowingly false statements be made "in any matter within the jurisdiction of any department or agency of the United States" is a jurisdictional requirement. Its primary purpose is to identify the factor that makes the false statement an appropriate subject for federal concern. Jurisdictional language need not contain the same culpability requirement as other elements of the offense. * * * On its face, * * * § 1001 requires that the Government prove that false statements were made knowingly and willfully, and it unambiguously dispenses with any requirement that the Government also prove that those statements were made with actual knowledge of federal agency jurisdiction.

Similarly, in *United States* v. *Feola*, 420 U.S. 671, 676-677 n.9 (1975), the Court observed that "[t]he significance of labeling a statutory requirement as 'jurisdictional' is * * * that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." Accord *Barnes* v. *United States*, 412 U.S. 837, 847 (1973) (knowledge that checks were stolen from the United States mails, as opposed to knowledge that they were stolen, not required under 18 U.S.C. 1708).

3. Alternatively, Cisneros claims that the government had to prove that interstate facilities were used "in furtherance of" or "facilitated" the underlying offense. See 00-1526 Pet. 22-23. As the court of appeals explained, however, the government met that burden. Cisneros's constant importunings for news of the planned murder, that court explained, caused Martinez to interrupt Garza during their international telephone conversations to press the earlier request that Garza find someone to commit the murder. Pet. App. 49. Martinez's use of international telephone lines to com-

municate about a planned murder did facilitate the scheme. Absent the "incessant reminders during those calls," the court of appeals explained, "Garza [might] not have made as serious an effort to find a hit man." *Ibid.*

Cisneros's proposed instruction, moreover, was fatally defective. Cisneros proposed that the government be required to prove that Cisneros "caused *Daniel Garza* to use a facility of foreign commerce to call Maria Martinez in Brownsville from [Mexico] * * * in furtherance of the alleged murder-for-hire." 00-1526 Pet. 9 n.4 (emphasis added). But the government was not required to prove that Cisneros caused *Garza* to *initiate* a phone call in furtherance of the murder for hire. The government instead was required to prove that Cisneros caused *someone* to *use* a foreign or interstate commerce facility in furtherance of the scheme. In this case, the government showed that Cisneros caused *Martinez* to use a facility of foreign commerce to facilitate the scheme. In particular, even though Garza may have initiated the international calls with Martinez to discuss other matters, Cisneros's constant pressure caused Martinez to communicate over facilities of foreign commerce to promote the murder-for-hire scheme. Pet. App. 49, 53-54.[14]

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[14] Cisneros's claim (00-1526 Pet. 23) of conflict between the (vacated) panel opinion on rehearing (Pet. App. 48-49) and the First Circuit's decision in *United States* v. *Houlihan*, 92 F.3d at 1292, is without merit. According to Cisneros, the decision below rejected any requirement that the use of the facility be in "furtherance" of the murder for hire, and instead required that the use "facilitate" the scheme; the First Circuit and earlier Fifth Circuit Travel Act cases, she asserts, use a "furtherance" standard. 00-1526 Pet. 23 (citing *Houlihan*, *supra*; *United States* v. *Presley*, 478 F.2d 163, 168 (5th Cir. 1973); and *United States* v. *Gooding*, 473 F.2d 425, 427-428 (5th Cir.), cert. denied, 412 U.S. 928 (1973)). Elsewhere, however, Cisneros concedes that the standard of "furtherance" employed in *Houlihan* and earlier Fifth Circuit decisions does not meaningfully differ from the standard of "facilitation" employed by the vacated panel decision. In any event, any tension between the vacated

Relying on *Rewis* v. *United States*, 401 U.S. 808 (1971), Cisneros also asserts (00-1526 Pet. 18, 23-25) that the nexus between the international telephone calls and the murder-for-hire scheme was too "fortuitous and incidental" to support a conviction under Section 1958. In *Rewis*, persons operating an illegal lottery in Florida were charged with violating the Travel Act, 18 U.S.C. 1952, based on the interstate travel of some of their customers. The Court held that "Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State." 401 U.S. at 812. The Court adverted, however, to "cases in which federal courts ha[d] correctly applied [the Travel Act] to those individuals whose *agents* or *employees* cross state lines in furtherance of illegal activity." *Id.* at 813 (emphasis added). One such case was *United States* v. *Zizzo*, 338 F.2d 577 (7th Cir. 1964), cert. denied, 381 U.S. 915 (1965), where the court upheld the Travel Act conviction of a defendant who employed out-of-state individuals to work at his gambling business because "[i]t is clear that the gambling business operated by [the defendant] caused the interstate travel by the three employees." *Id.* at 580. In this case too, Cisneros's request that Martinez find someone to kill Fischer caused Martinez, as Cisneros's agent, to use a foreign commerce facility (international phone lines) to press Garza to hire the hit men. Because the international conversations served to facilitate the murder-for-hire scheme, the evidence established a legally sufficient nexus between the telephone use and the illegal scheme. Pet. App. 49. See *United States* v. *Weathers*, 169 F.3d at 343-344; *United States* v. *Baker*, 82 F.3d at 275-276; *United States* v. *Auerbach*, 913 F.2d at 410-

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panel opinion and earlier Fifth Circuit decisions is a matter for the Fifth Circuit, not this Court.

411; *United States* v. *Garrett*, 716 F.2d 257, 264-266 (5th Cir. 1983), cert. denied, 466 U.S. 937 (1984).

4. Finally, Cisneros contends (00-1526 Pet. 25-30) that she was not prosecuted within the five-year statute of limitations period. The court of appeals' (now-vacated) panel opinion rejected that argument, stating that the statute of limitations did not begin to run until March 3, 1993, the day the murder was completed and payment was made. Pet. App. 57-58. That statement, Cisneros argues, conflicts with decisions of the Eighth Circuit, *United States* v. *Delpit*, 94 F.3d 1134, 1149 (1996); *United States* v. *Finley*, 175 F.3d 645, 646 (1999), cert. denied, 528 U.S. 1094 (2000); *United States* v. *Davidson*, 122 F.3d 531, 535, cert. denied, 522 U.S. 1034 (1997). According to Cisneros (00-1526 Pet. 27-28), those cases hold that a violation of Section 1958 is "complete" once an interstate or foreign commerce facility is used with the requisite intent, regardless of when the murder actually takes place.

The claim of conflict is incorrect. Neither *Delpit*, *Finley* nor *Davidson* addresses *statute of limitations* issues. Instead, those cases merely state that the crime of murder for hire is complete upon the use of interstate commerce with the requisite intent, *Delpit*, 94 F.3d at 1149; *Finley*, 175 F.3d at 645, or restate the elements of murder for hire in violation of Section 1958, *Davidson*, 122 F.3d at 535. Moreover, none of those cases addresses whether the offense of murder for hire can be considered a "continuing offense" for statute of limitations purposes where, as here, the participants in the scheme continue to pursue their murder-for-hire goal after the interstate facility is used.[15] As this

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[15] Nor do the district court decisions cited by Cisneros (00-1526 Pet. 28) address that point. *United States* v. *Superson*, No. 95 CR 564, 1997 WL 223072, *1 (N.D. Ill. Apr. 24, 1997), declares that the crime is complete when the elements have all been committed; and *United States* v.

Court has explained, continuing offenses are an exception to the general rule that the statute of limitations begins running once the crime is complete. *Toussie* v. *United States*, 397 U.S. 112, 114 (1970). For continuing offenses, "the statute of limitations does not begin to run when all elements are first present, but rather begins when the offense expires" as through abandonment or completion. *United States* v. *Yashar*, 166 F.3d 873, 875 (7th Cir. 1999). A crime is a continuing offense for statute of limitations purposes when its "language * * * compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie*, 397 U.S. at 115; *United States* v. *Bailey*, 444 U.S. 394, 413 (1980) ("Given the continuing threat to society posed by an escaped prisoner, 'the nature of the crime involved [escape from federal custody, 18 U.S.C. 751(a)] is such that Congress must assuredly have intended that it be treated as a continuing one.'") (quoting *Toussie*, 397 U.S. at 115).

Here, even if the murder-for-hire offense was complete and thus subject to prosecution once the foreign commerce facility was used in 1992, the scheme continued—and the statute of limitations therefore did not begin to run—until Joey Fischer was murdered and the blood-money was paid on March 3, 1993, less than five years before Cisneros's indictment. That Congress intended Section 1958(a) violations to be considered "continuing" until such time as the scheme is completed or otherwise terminated, moreover, is apparent from Section 1958's penalty provisions, which provide enhanced punishment where the murder-for-hire scheme results in personal injury or death.[16] It is unlikely

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Brockdorff, 992 F. Supp. 22, 24 (D.D.C. 1997), merely restates the elements of the crime.

[16] At the time petitioner committed the offense in 1993, the statute provided that anyone who violated its provisions "shall be fined not more

that Congress intended the statute of limitations to begin running before the events necessary to determine punishment had taken place.[17] Indeed, under Cisneros's theory, the statute of limitations would begin running before the goals of her illegal scheme—the murder and payment—were even attempted, and thus before the police and prosecutors would have had any reason to know of the illegal scheme. There is no evidence that Congress intended such a counter-intuitive result. In any event, Cisneros's argument also ignores evidence of international travel, in violation of the statute, that occurred within the 5-year statute of limitations period. See pp. 3-4, *supra*; Pet. App. 7, 18, 34. Although Cisneros challenges the sufficiency of that evidence, that question of sufficiency is fact-bound and does not warrant this Court's review.

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than $10,000 or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both." 18 U.S.C. 1958(a) (1988). In 1994, Congress amended the statute to make murder-for-hire a capital crime if the offense resulted in death. Pub. L. No. 103-322, § 60003(a)(11), 108 Stat. 1969.

[17] For related reasons, one court has suggested that the sentence enhancing factor of death might constitute an element of the offense. See *United States* v. *Smith*, 232 F.3d 650, 652 (8th Cir. 2000). Cisneros, however, raises no claim under *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), and any such error would be harmless beyond a reasonable doubt. It is not and has never been disputed that Joey Fischer was murdered.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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